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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIS DISMUKE MURRAY, Defendant and Appellant.	A143840 (Contra Costa County Super. Ct. No. 51307321)

Defendant appeals his conviction for a forcible rape occurring in 1997. Defendant was not charged with this offense until 2011, following a match with DNA from a swab of the victim with his DNA obtained after his arrest for another offense. Although the parties' briefs recount at length the evidence concerning this offense and a second offense for which defendant was not convicted, no issue is raised concerning the sufficiency of the evidence to support the conviction. It therefore is unnecessary to relate the evidence in order to consider the two contentions defendant does present on appeal: that the court erred in failing to discharge a juror for cause and in failing to discharge the jury after it twice reported that it was unable to reach a verdict. There was no error in either respect and we shall therefore affirm the judgment.

Background

Defendant was charged with forcible rape (Pen. Code, § 261, subd. (a)(2))[1] enhanced by allegations that the offense was committed by means of a kidnapping that

[1] All statutory references are to the Penal Code unless otherwise noted.

substantially increased the risk of harm (§§ 667.61, 207, 209, 209.5). In separate counts he was also charged with kidnapping for sexual purposes (§ 209, subd. (b)(1)) and with an attempted robbery of another victim several years later (§§ 211, 212.5, subd. (a), 664). Following a jury trial, defendant was found guilty of the forcible rape, but the enhancements were found not true and defendant was found not guilty of the kidnapping charge. The jury remained deadlocked on the attempted robbery charge and that charge was dismissed. Defendant was sentenced to imprisonment for eight years and timely filed a notice of appeal.

Discussion

1. *Failure to discharge a juror*

The facts concerning defendant's first claimed error are not in dispute. During the fifth day of trial testimony, following a short recess, defense counsel informed the court that she had just seen Juror No.6 speaking with a prospective witness, Jennifer Smith, in the hall outside the courtroom. Defense counsel told the court, "I caught just a very little snippet . . . . But it was — they were having a conversation, it appeared." Counsel continued, "So, obviously, that's not appropriate. I think that it needs to be addressed with both the witness and then the jurors need to be reminded." The prosecutor commented that the juror approached the witness and asked her where she was from and they appeared to have a brief conversation about travel. When defense counsel told him the two were talking, he "went out and had Ms. Smith come in to stop the conversation." The judge indicated she would speak with Smith and defense counsel responded, "I'm willing to accept the representation [of the prosecutor]. Well, I guess if you want to ask her. But I think that -- I'm not sure we need to isolate (Juror No. 6). But the jurors need to be reminded that even casual conversation gives an appearance of impropriety."

Outside the jury's presence, the court asked Smith, "It's my understanding there was a juror who approached you and just had a conversation with you about a matter not related to this case?" Smith responded, "That's correct. She asked me where I was from so I told her Dallas, Texas. [¶] And she had asked, you know, 'Well, that's' -- or made the comment that, you know, 'That's not too terrible of a flight.' [¶] I said, 'No, it's not. I

flew Southwest.' [¶] You know, it was just -- it wasn't much more. It was just that type of conversation." The court pointed out to Smith that she had been instructed not to speak with jurors, and Smith responded, "Yes. She did, in fact, speak to me, so I didn't -- I didn't want to be rude so I -- I did answer her questions." The court told Smith that in the future she should respond to such an approach by stating that she could not speak with the person because she was a juror, and told the attorneys, "So do you want -- I'm just going to instruct the jury not to have conversations with anybody that could potentially be a witness."

After Smith testified the court instructed the jury: "It's my understanding that one of the jurors possibly briefly spoke, possibly accidentally, to a witness. Apparently the content of the conversation had nothing to do with the trial, had to do with travel. But it -- that cannot happen. So I may not have admonished you clearly enough, but I do want to make it clear that the appearance of impropriety occurs not only if you speak to one of the attorneys, but if you speak to any witness or even if you think it's a potential witness. We instruct our witnesses not to speak to somebody with a juror badge. So there was a misunderstanding there also on behalf of the witness because that person obviously knew they were a witness. But I want to emphasize very strongly to you, unless you are certain the person is not a witness, please do not approach them and speak with them. It's very important that we not even have the appearance of impropriety."

Defense counsel made no objection to the trial court's proposed course of action, nor did she request that the court question the juror or remove the juror for misconduct. On appeal, however, defendant argues that because the court had previously instructed members of the jury numerous times not to speak with anyone connected with the case, the juror disobeyed the court's express instructions. Despite trial counsel's failure to object or request the court to do anything further, he contends the court was obligated sua sponte to excuse Juror No. 6 for such misconduct. He contends that the court's failure to do so denied him a fair trial and an impartial jury in violation of his rights under the Sixth and Fourteenth Amendments.

It is doubtful whether the brief exchange between Juror No. 6 and the trial witness can be considered misconduct. As in *People v. Goff* (1981) 127 Cal.App.3d 1039, 1046, "the conversations were so brief, so innocuous and so unrelated as not to constitute misconduct. The essence of juror misconduct, as defined in . . . section 96, involves communications relating to the trial." Defendant's trial counsel correctly characterized the exchange as "casual conversation," which, though improper, was brief and entirely unrelated to the matter on trial. When the matter was brought to the court's attention, the court properly took immediate steps to determine what had occurred. Moreover, as *Goff* also points out, any error was waived by the failure to have requested a mistrial, dismissal of the juror or further inquiry. (*Id.* at p. 1046.) Indeed, trial counsel's comments indicated her complete approval with the manner in which the court handled the situation. Further, even if the juror were deemed to have engaged in misconduct and the objection were not waived, the court did not abuse its discretion in failing to excuse the juror, deeming the incident to have been inconsequential and threatening no prejudice to defendant. (E.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1351.) Defendant has shown no prejudice, and the presumption of prejudice from juror misconduct has been overcome by the "trifling" nature of the misconduct, in addition to the weight of the DNA and other evidence of defendant's guilt; there would be no basis to reverse the judgment even if, contrary to our conclusion, there had been any error in the trial court. (*People v. Ryner* (1985) 164 Cal.App.3d 1075, 1083-1084.) Certainly this minor incident did not deny defendant an impartial jury or a fair trial.

2. *Failure to declare mistrial when jury reported deadlock*

Defendant's second contention is that the court coerced a compromise verdict when it urged the jury to continue deliberating after the jury twice advised the court that it could not reach a verdict. The presentation of evidence in this case consumed some seven days and the jury was instructed and heard argument on an additional day. The jury deliberated for less than a half hour on that final day and its deliberations spread over an additional four days before verdicts were returned. The parties disagree as to the number

of hours over which deliberations actually extended—taking into account such matters as delays in awaiting readback of testimony and possible discrepancies in the clerk's minutes—but accepting the calculations in defendant's appellate brief, the jury deliberated 14 hours, 59 minutes "overall." A review of the interchanges between the court and the jury during this period provides no basis to conclude that the court's remarks to the jury, urging them to continue their deliberations, can in any sense be considered coercive.

Section 1140 provides that a jury may not be excused after the cause has been submitted to it before a verdict has been reached without the consent of both parties "unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." "The determination whether there is a reasonable probability of agreement rests within the sound discretion of the trial court. [Citation.] 'Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived " 'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' " ' " (*People v. Harris* (2005) 37 Cal.4th 310, 363-364.) In *Harris*, although the jury informed the court on three occasions that it was deadlocked, the trial court did not abuse its discretion by refusing to declare a mistrial. (*Id.* at pp. 364-365; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 774-777 [no error in denying mistrial motion when jury stated it was "hopelessly deadlocked" after 18 days of deliberations, 11 days of renewed deliberations when an alternate was placed on the panel, and four earlier messages to the court that it was deadlocked].)

Here, the jury retired to deliberate following closing arguments and instructions on Tuesday, September 16, 2014, and deliberated the following day with several requests for readbacks of testimony. On Thursday, September 18, the jury submitted a note that it was "unable to reach a decision." The jury returned to the courtroom where a substitute judge

filling in for the trial judge asked "if there's any legal issue that I could assist you with, any instructions or clarification of the instructions . . . that would be helpful for the jurors" or whether "there's any additional testimony that you think would be helpful," to which the foreperson responded there were none. After determining that there had been no change in the vote within the jury, the court requested the jury to deliberate further with the following explanation: "I know the case has been going on for about two weeks of testimony and deliberations, two weeks of testimony and argument, so forth, and that you've been deliberating for about a day, which is relatively a short period of time for a case of this complexity. So I am going to ask that you continue to deliberate and try to reach a verdict if you can in accordance with all the instructions you've been given by Judge Maier. And if after continuing to attempt, you believe you're unable to reach a verdict, let us know and we'll talk again. But I want you to keep trying if you would, please. So if you'd return to the jury room, I appreciate it." The jury deliberated until 3:00 p.m. that day and then recessed until the following Monday.

After resuming deliberations for less than an hour on Monday, September 22, the jury sent another note stating, "We are unable to make a decision." Over defendant's objection, the trial judge (who had returned) advised counsel that she would give the jury additional instructions. In explanation, the court "note[d] for the record one of the reasons I'm concerned about the length of the deliberations is this was a lengthy trial. And there was not one juror, excepting the two alternates, that took detailed notes. It was astounding to me. Once in a while one juror would scribble something here or there, but there was nobody taking very detailed notes as to each witness the way the court was. So I'm finding that, you know, the length of time that they've had to deliberate is very short. . . . So the sum total of hours of deliberating is probably five, if that.[2] It's not even a full

[2] Defendant disputes this number, contending that at that point the jury had been deliberating for 10 hours, 36 minutes. Whether five hours or 10, or more likely some number in between, we do not consider the difference significant to the determination of whether the jury could reasonably have felt coerced into reaching a verdict.

day of deliberation. That's my concern is that they really haven't taken the time, they're throwing up their hands."

When the jury returned to the courtroom, the court addressed the jury, in full, as follows:

"So ladies and gentlemen, I do want to note that even though you've been deliberating a number of days, it still has been a short amount of time. I do have further instructions to give you. It has been my experience on more than one occasion that a jury which initially reported that it was unable to reach a verdict was ultimately able to arrive at a verdict. To assist your further deliberations, I'm going to further instruct you as follows: Your goal as jurors should be to reach a fair and impartial verdict if you are able to do so, based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes to do so. It is your duty as jurors to carefully consider, weigh, and evaluate all of the evidence presented at the trial, to discuss your views of your fellow jurors. In the course of your further deliberations, you should not hesitate to reexamine your own views or to request your fellow jurors to reexamine theirs. You should not hesitate to change a view you once held if you are convinced it is wrong, or to suggest other jurors change their views if you are convinced they are wrong. Fair and effective jury deliberations require a frank and forthright exchange of views. As I previously instructed you, each of you must decide the case for yourself and you should do so only after a full and complete consideration of all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict, if you can do so, without violence to your individual judgment. Both the People and the defendant are entitled to the individual judgment of each juror.

"As I previously instructed you, you have the absolute discretion to conduct your deliberations in any way you deem appropriate. May I suggest that since you've been unable to arrive at a verdict using the methods that you have chosen, that you consider to change the methods you have been following at least temporarily and try new methods. For example, you may wish to consider having different jurors lead the discussions for a period of time. You may wish to experiment with reverse role-playing by having those on

one side of the issue present and argue the other side's positions, and vice versa. This might enable you to better understand the others' positions. By suggesting you should consider changes in your methods of deliberations, I want to stress that I am not dictating or instructing you as to how to conduct your deliberations. I merely find that you may find it productive to make sure each juror has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors. I also suggest you reread instruction [CALCRIM No.] 200 and instruction [CALCRIM No.] 3550. These instructions pertain to your duties as jurors and make recommendations as to how you should deliberate. The integrity of a trial requires that jurors at all times during deliberations conduct themselves as required by these instructions.

"The decision the jury renders must be based on the facts and the law. You must determine what facts have been proved from the evidence received in the trial and not from any other source. A fact is something proved by the evidence or by stipulation. Second, you must apply the law that I state to you to the facts as you determine them and in this way arrive at your verdict. You must accept and follow the law as I state it to you regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions. Instruction 3550 defines the jury's duty to deliberate. The decisions you make in this case must be based on the evidence received in the trial and instructions given by the court. These are the matters this instruction requires you to discuss for the purpose of reaching a verdict. You should keep in mind the recommendations this instruction suggests when considering the additional instructions, comments, and suggestions I have made in the instructions now presented to you.

"I hope my comments and suggestions may have been of some assistance to you. I will ask that you continue your deliberations at this time. If you have other questions, concerns, requests, or any communications you desire to report to me, please put those in writing on the form my bailiff will provide you, have them signed and dated by your foreperson or one or more of the other jurors, and then notify the deputy. I can see from

the crossed arms and the expressions on the faces that there's a lot of frustration, and I'm hoping that you go back with a fresh attitude, see what you can do. Thank you."

The jury deliberated further that day, requested and received clarification regarding the kidnapping enhancement, and recessed for the night at 4:42 p.m. After approximately a half hour of further deliberations the following day, September 23, the jury returned with its verdicts on two of the three counts.

We have set out the court's remarks in full because they, better than any characterization, make plain that the court did not suggest "displacing the jury's independent judgment 'in favor of considerations of compromise and expediency' " (*People v. Breaux* (1991) 1 Cal.4th 281, 319), or place "undue pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all" (*People v. Carter* (1968) 68 Cal.2d 810, 817). The court was never advised as to how the jury was divided numerically, so that the minority (if there was a minority) could not have viewed the court's remarks as exerting pressure upon them to conform their opinion to that of the majority. (See *Carter*, *supra*, at pp. 819-820.) The court's remarks contain none of the elements of the discredited so-called "*Allen* charge" or "dynamite charge." (See *People v. Gainer* (1977) 19 Cal.3d 835, disapproved on another ground in *People v. Valdez* (2012) 55 Cal.4th 82, 163.) As in *People v. Sandoval* (1992) 4 Cal.4th 155, 196, "[n]othing in the record suggests that the jury was coerced in any way."

In short, the court did not abuse its discretion in requesting the jury to deliberate further, without coercion, and in determining that there was a reasonable probability that further deliberations would produce agreement.

Disposition

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Jenkins, J.